



The Attorney General of Texas

August 5, 1982

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Affirmative Action Employer

Mr. Marlin W. Johnston
Commissioner
Texas Department of Human Resources
P. O. Box 2960
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Open Records Decision No. 319

Re: Availability under the
Open Records Act of Request
for Proposal and proposals
submitted by National Heritage
Insurance Company and Bradford
National Corporation for Texas
Medicaid Program contract

Dear Mr. Johnston:

You have requested our decision under the Open Records Act, article 6252-17a, V.T.C.S., as to the availability of proposals submitted to the Department of Human Resources in regard to the administration of a portion of the Texas Medicaid Program.

Your request to this office for an Open Records Decision is dated one month after the Department of Human Resources received the letter requesting access to the documents. Open Records Decision No. 71 (1975) states the applicable rule when the ten day deadline is not met:

There was a delay of more than ten days between the receipt of the request for information and your forwarding it to this office. This gives rise to a presumption that the information is public. Section 7(a).

However, in Open Records Decision No. 26 (1974) we indicated that this presumption could be overcome by a compelling demonstration that the requested information should not be made public. Here, the information is excepted from disclosure by a provision clearly designed to protect the privacy interests of a third party, the individual employee. We do not believe that delay on the part of the governmental body can be allowed to diminish that interest. We consider the protection of the privacy interest of a third

party in this instance a compelling reason which overcomes the presumption.

Thus, if a compelling interest can be shown for holding some of this material confidential, the presumption of openness may be overcome.

In 1980, the Texas Department of Human Resources [hereinafter DHR] received proposals from National Heritage Insurance Company [hereinafter NHIC] and Bradford National Corporation [hereinafter Bradford] in response to DHR's Request for Proposal for Administration of a Portion of the Texas Medicaid Program. Initially, DHR awarded the contract to Bradford, and then attempted to terminate that award. See Attorney General Opinion MW-254 (1980). NHIC sued DHR over this matter, National Heritage Insurance Company v. Texas Department of Human Resources, Civ. No. 313186, District of Travis County, 167th Judicial District of Texas, but while the suit was pending, DHR reviewed the bids with the aid of a consultant and concluded that the specifications did not meet the department's needs. All bids were then rejected, and no further litigation resulted.

You have received a request for copies of the original proposals submitted in 1980 by Bradford and NHIC. You suggest that all or part of these proposals may be withheld from disclosure under sections 3(a)(1), (2), (4) and (10) of the Open Records Act.

Section 3(a)(10) excepts from disclosure:

trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

Since this provision is designed to protect third party interests that have been recognized by the courts, we believe that a compelling interest may be shown with respect to material covered by section 3(a)(10).

This office has in the past required a company claiming the 3(a)(10) exception for "commercial and financial information" to demonstrate compliance with the criteria established by the Restatement of Torts in determining whether and in what manner particular information constitutes a "trade secret." See Open Records Decision Nos. 306 (1982); 296 (1981); 175 (1977). Both Bradford and NHIC contend that certain portions of their proposals satisfy the criteria of the Restatement.

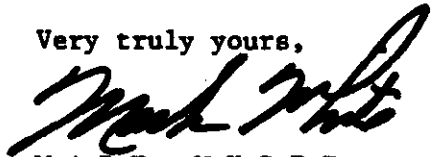
In our opinion, both Bradford and NHIC are entitled to withhold the technical portions of their proposals. Bradford may withhold the following: information system, technical proposal, section 3.3; computer hardware and software, technical proposal, sections

3.5.1-3.5.4; facilities configuration and security systems, technical proposal, sections 3.5.4-3.5.5; implementation work plan, technical proposal, section 4. Similarly, NHIC may withhold all of part III - "technical approach" and part VI - "implementation" of both the purchased health services portion and the vendor drug program. This office has long recognized that material which is essentially technical in nature and which relates to the substance of a proposal is, as a rule, excepted from disclosure under section 3(a)(10).

On the other hand, information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing are not ordinarily so excepted. Open Records Decision Nos. 306 (1982); 175 (1977). Pricing proposals may be withheld only during the bid submission process. Open Records Decision Nos. 306 (1982); 184 (1978).

As to your other contentions, it has frequently been noted that section 3(a)(4) is not applicable when bidding on a contract has been completed. Open Records Decision Nos. 184 (1978); 75 (1975). Section 3(a)(2), which relates to the privacy of public employees, is not available to others. Finally, section 3(a)(1) in this instance adds nothing to section 3(a)(10), since both except information made confidential by statute or judicial decision.

Very truly yours,



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